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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

THEODORE ROBERT BUNDY and
MILLARD C. FARMER, JR.,

Petitioners,

v.

JOHN A. RUDD, in his capacity as Judge for the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, and

CHARLES M. McCLURE, in his capacity as Judge in the County Court of Leon County, Florida, for the Second Judicial Circuit,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-

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THEODORE ROBERT BUNDY and
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v.

JOHN A. RUDD, In His Capacity as Judge for the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, and

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

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Petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, rendered August 3, 1978.

CITATIONS TO OPINIONS BELOW

The memorandum order of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, which was unreported, is annexed as Exhibit A. The Supreme Court of Florida denied petitions for writs of certiorari, of prohibition, of mandamus and for other relief in orders without published opinion, reported at 362 So.2d 1050 (1978), which are annexed as Appendix B.

JURISDICTION

The order of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida was entered on August 3, 1978. The Supreme Court of Florida denied petitions for writs of certiorari, of prohibition, of mandamus and for other relief in orders entered August 21, 1978. This Court, on November 16, 1978, granted an extension of time to file a petition for a writ of certiorari to and including December 29, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I. Whether the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require a state court to hold an evidentiary hearing, with prior notice of applicable legal standards and of specific instances of alleged misconduct, before it may deny an out-of-state attorney permission to represent a defendant pro hac vice in a capital case.

II. Whether the First and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment impose any limitations on a state court's discretion in deciding whether to permit an out-of-state attorney to represent a defendant pro hac vice in a capital case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the First, Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves Rule 2.060(b) of the Florida Rules of Judicial Administration:

> "Foreign Attorneys. Upon motion filed with a court showing that an attorney is a member in good standing of the bar of another state and that, under the rules of comity of the other state a member of The Florida Bar is permitted to appear in that state, attorneys of other states may be permitted to appear in particular

cases in a Florida court. A request for an appearance shall be before oral arguments in an appellate court proceeding and before trial in a trial court. Attorneys of other states shall not do a general practice unless they are members of The Florida Bar in good standing."

STATEMENT OF THE CASE

On February 15, 1978, petitioner Theodore Robert Bundy ("Bundy") was arrested in Pensacola, Florida on suspicion of theft. While incarcerated awaiting trial, Bundy was charged with the January 15, 1978 slayings in Tallahassee of two members of a Florida State University sorority in the so-called "Chi Omega" murders. These murders had received widespread attention in the Florida news media, and the arrest of Bundy -- a fugitive wanted in several other states for questioning concerning other crimes -- intensified public interest in the case.

Petitioner Bundy's first telephone call after his arrest was placed to petitioner Millard C. Farmer ("Farmer"), an attorney with the Team Defense Project, Inc., in Atlanta, Georgia, who had known Bundy for over two years and had represented him on criminal charges in Colorado. The law practice of Farmer and of the Team Defense Project, Inc., is devoted principally to the

defense of capital cases, and Bundy requested Farmer to come to Florida to defend him against expected capital charges.

Prior to Bundy's formal indictment in Leon County for the "Chi Omega" murders, the Honorable John A. Rudd, Judge for the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, on his own motion appointed the local Public Defender Office to represent Bundy in certain matters related to the anticipated indictments. On July 24, 1978, Bundy came before Judge Rudd on motions filed by the Public Defender. At the outset of the hearing, Public Defender Michael Minerva filed a motion to permit Millard Farmer to appear as defense counsel representing Bundy (A. 4).*/ The motion was accompanied by a certificate evidencing Farmer's good standing in the Georgia bar. Addressing the court, Public Defender Minerva stated:

> "[W]e believe that the motion is timely, we believe that the Court has the authority and Mr. Farmer is particularly well-versed in

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*/ All references are to the Appendix on appeal in a companion case, Bundy & Farmer v. Rudd, et al., 581 F.2d 1126 (5th Cir. 1978) from which a petition for a writ of certiorari has been filed in this Court on December 29, 1978 (No. 78-), and each reference will be indicated by the abbreviation "A." followed by the number of the page on which the reference may be found.

these type cases of potential death cases. He has represented clients all over the country. He has been admitted in the Florida courts before on a pro hac vice basis and we would ask the Court to allow him to assist us in this case because of the magnitude of the case and his expertise" (A. 6-7).

Judge Rudd then questioned Farmer:

> "THE COURT: The Court read an article not long ago of a list of speakers, and I believe Mr. Farmer was listed as one of those speakers and he was going to address some group on pretrial publicity and things of that sort. Am I in error?
>
> MR. FARMER: Your Honor, I have spoken on that subject.
>
> THE COURT: Well, I think you and I need to talk in Chambers or somewhere under a more relaxed condition about pretrial publicity and the ABA and Florida Ethics, dealing with that subject matter, before I admit you to practice in this court.
>
> MR. FARMER: Your Honor, I would be glad to not only speak in Chambers, but speak on the record in court about that issue.
>
> THE COURT: I'm not concerned about that either. I don't want to take the time now. I don't think it is appropriate at this time. . . " (A. 7-8).

The court thereupon reserved decision on the motion (A. 8) and directed the Public Defender to proceed.

On July 27, 1978, a Leon County grand jury indicted Bundy on two counts of murder, three counts of attempted murder and two counts of burglary (A. 12-13). The following day, Bundy appeared before the Honorable Charles A. McClure in the Leon County Court for a "first appearance." Bundy filed a handwritten motion seeking to have Millard Farmer appointed to represent him during this appearance (A. 15), and stated to the court:

> "Your Honor, I asked Mr. Farmer to be here this morning. I wished for him to represent me in my first appearance as he has outlined to the Court he wishes to be appointed for the limited purpose of representing me for this first appearance. I would resist the appointment of any other attorney" (A. 20).

Judge McClure replied that

> "since there is a motion pending in the Circuit Court . . . .I would make [an] appointment of the Public Defender at this point until your qualifications . . . and admissions and everything are . . . considered by Judge Rudd in the motion already pending. I'm certain he will give you a full hearing on that" (A. 20).

Thereafter, on July 31, 1978, Bundy was arraigned on the capital indictment before the Honorable John Rudd. Farmer once again pressed for permission to defend Bundy but the court reserved decision, promising a hearing on the issue on August 2, 1978 (A. 173).

On August 2, 1978, the Circuit Court convened to consider three matters: Farmer's pro hac vice motion; a motion by the State to postpone Bundy's trial; and a motion to disqualify Judge Rudd on the grounds that the Judge was partial and prejudiced against Bundy, that he had engaged in ex parte communications without notice concerning the case, and that he had made public comments about the case which interfered with Bundy's right to a fair trial (A. 36-37).

At the outset of the proceeding, Farmer was questioned by the court concerning other admissions pro hac vice in Florida and indicated that he had been admitted pro hac vice in a Dade County, Florida case within the prior year (A. 44-45) and that he had "been admitted pro hac vice to represent clients in Louisiana, Mississippi, Alabama, South Carolina, North Carolina, South

Dakota and had never been denied admittance to appear pro hac vice in any case" (A. 45).

The court then asked Farmer about the status of two criminal contempt convictions against him which at that time were on petition for certiorari in the Supreme Court of Georgia (A. 45).*/ When

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*/ The Supreme Court of Georgia denied Farmer's petition for a writ of certiorari on two contempt convictions on September 14, 1978, reconsideration denied, October 3, 1978. A petition for certiorari to review the judgment of the Georgia Court of Appeals is presently pending in this Court in Farmer v. Holton, petition for cert. filed, 47 U.S.L.W. ____ (U.S. Dec. , 1978) (No. 78-). The facts surrounding the contempt convictions are set forth in the petition for certiorari in Farmer v. Holton, supra, at 5-15. Briefly stated, the contempt convictions arose out of Farmer's resistance to what he perceived as invidious racial discrimination against his client during a capital trial in Georgia. Farmer's first contempt citation during the case came after he vigorously objected to the Georgia prosecutor's insistence on addressing Farmer's black client by his first name "George" rather than as "Mister Street," the form of address the prosecutor had employed for white witnesses. The second citation came later in the trial after Farmer insisted that complaints of racial intimidation of black witnesses and spectators be dealt with immediately by the court.

Farmer began to advert to the facts surrounding the contempt citations, Judge Rudd remarked, "I didn't want to bring up the subject matter of the case [Farmer v. Holton] Mr. Farmer . . . "(A. 46). Farmer responded that "if the Court's going to consider that, I would like to put up evidence on it . . . " (A. 47).

The court refused to grant Farmer's request, turning instead to the question of whether any disciplinary proceedings were pending as a result of the contempt convictions. Id. After Farmer assured the court that no disciplinary proceedings had ever been undertaken against him, the court's interrogation of Farmer continued:

> "THE COURT: Well, haven't you, Mr. Farmer, spoken extensively on the value of pretrial publicity as it affects the outcome of cases and things of that sort?
>
> MR. FARMER: Your Honor, I am a member of the faculty of the National College of Criminal Defense Lawyers and Public Defenders. I do, as far as continued legal education with that organization and as far as continued legal education with the state Bars of South Carolina, Florida, Georgia, Louisiana . . .

> THE COURT: But the question was: don't you speak extensively on that subject?
>
> MR. FARMER: No, sir. I don't speak extensively on that subject. The subject that I speak extensively on is capital punishment cases, because that is the only type of case -- in other words, my practice is limited to capital punishment cases.
>
> THE COURT: But isn't it a part of your approach to a case, Mr. Bundy, to -- seek or curry or -- putting it more politely -- not refuse an opportunity to comment on a case pending in this -- in a Court?
>
> MR. FARMER: Your Honor, you addressed that to Mr. Bundy. Did you mean . . .
>
> THE COURT: Excuse me. Mr. Farmer.
>
> MR. FARMER: Yes, sir. And excuse me for missing your question.
>
> THE COURT: Isn't that part of your approach to any given case?
>
> MR. FARMER: Your Honor, I don't have an approach to any case that is inconsistent with the canons of ethics, the laws of the state that I'm involved in and the constitution of the United States.
>
> I am one of the strongest believers in our system of justice . . .
>
> THE COURT: That -- that's fine.

MR. FARMER: . . . and the answer to that question would be, no, I have never advocated anyone to violate the constitution of the United States, the laws of the United States and -- and the things that we cherish dearly.

THE COURT: But haven't you been quoted extensively or quoted pretty regularly -- television, radio and newspaper for the last week or ten days as it relates to this case?

MR. FARMER: Your Honor, if you have any such quotations that indicate in any way that I have violated any act, I think they should be placed in evidence . . .

THE COURT: No one said you had violated anything.

MR. FARMER: . . . Your Honor.

THE COURT: My question was: haven't you spoken to all media rather regularly on this case?

MR. FARMER: Your Honor, I exercise my First Amendment rights at all times consistent with the canon of ethics of the State of Florida and consistent with the laws of Florida and consistent with the constitution of Florida.

And I feel that if there is any accusation that I am unfit that it should be done in the form of sworn testimony and shouldn't be done between

a -- this type of conference between you and I. If there is sworn testimony to anything like that, I think the Court should have it presented" (A. 47-49).*/

Judge Rudd next questioned Farmer extensively concerning Farmer's part in preparing the motion filed by Bundy to disqualify the judge, ascertaining that Farmer had assisted in drafting the motion and that he had initially signed the papers, later crossing out his signature. (A. 51-52).**/

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*/ Farmer had spoken publicly during the period in question, not principally about Bundy's pending criminal charges, but about the conditions of Bundy's pretrial detention and treatment. Subsequently, after these conditions had persisted, a federal suit was brought pursuant to 42 U.S.C. §1983 and on September 13, 1978, the United States District Court for the Northern District of Florida, Tallahassee Division, granted preliminary injunctive relief requested in Bundy v. Katsaris, TCA 78-0913 (N.D. Fla. Sept. 13, 1978) (A. 285-86). Farmer also stated to the press that excessive publicity surrounding Bundy should cease, and that the "circus atmosphere" should give way to orderly judicial proceedings.

**/ Although Judge Rudd dismissed the motion to disqualify himself on August 3, 1978, finding it to be "defective on its face . . . and filed for the purpose of delaying and disrupting the

The State Attorney was then given an opportunity to address the Court, and after setting forth cases and statutory authorities supporting the court's discretion to grant or deny pro hac vice status, continued:

> "MR SIMPSON [State Attorney] . . . I want to also point out to the Court a couple of other things that I think should bear on the Court's mind in exercising discretion in this case. During the last week to ten days, I, too, have been reading the newspaper. And it appears that Mr. Farmer has . . .
>
> MR. FARMER: Your Honor, I would object to any recitation of the evidence without it being under oath so I might examine him on this issue. I don't think that it is the proper way to put in evidence on -- in this manner.

**/ Cont'd.

orderly procedure of matters set for hearing" (A. 81), after Bundy brought a second motion to disqualify Judge Rudd, the Supreme Court of Florida on December 22, 1978 entered an order finding Judge Rudd in error for failure to disqualify himself. The Supreme Court found that the circumstances of this case involved, "'an intolerable adversary atmosphere' . . . between the trial judge and the litigant." Bundy v. Rudd, No. 55,610 (Fla., Dec. 22, 1978).

If he has any specific complaints that — that he wishes to make, I think that he is well aware of the proceedings, and I think I should have an opportunity to examine him.

THE COURT: I don't know that this is an evidentiary hearing to the extent that sworn testimony and witnesses are necessary, Mr. Farmer. This is more or less a discussion for the benefit of this Court, who feels a strong obligation to the bench and Bar to weigh carefully those persons who are admitted to practice before it.

MR. FARMER: Your Honor, I think . . .

THE COURT: And the Court will hear Mr. Simpson and give it what weight the Court finds it should have.

MR. FARMER: All right. So, Your Honor, we would object on the basis that it violates the sixth amendment confrontation right of the defendant, in addition to the fact that it would be hearsay. We would further object that it is a denial of due process to allow this type of evidence with us not knowing what is the status of the acceptance or rejection of it by the Court.

If the Court is rejecting it, I think it shouldn't be admitted. If it is being admitted, we should know under what

> basis. But we would like a continuing objection on that as to any of this testimony given not under oath.
>
> THE COURT: All right.
>
> MR. SIMPSON: Fine. I'll -- I'll withdraw any statement that I had in regard to the newspaper, Your Honor. I think the things that have happened in the newspaper are obvious" (A. 56-58). (Emphasis added.)

When Farmer again requested an opportunity to "put up evidence on this issue" (A. 58-59), the court replied, "Well, go ahead and state what you have. Make a proffer of it, if you will" (A. 59). Farmer first attempted to direct the court's attention to a number of decided cases concerning pro hac vice admissions. When he began to address the Georgia contempt issue, he was cut off:

> MR. FARMER: And, you know, I want to say to the Court, I regret more than anything that that judge held me in contempt. But I don't regret making an objection when a black person is called . . .
>
> THE COURT: Now, Mr. Farmer, just wait a minute.
>
> MR. FARMER: . . . by his first name . . .

> THE COURT: Wait a minute. You had your podium up there on that subject matter. That subject matter has no relationship to our hearing here. You can espouse that in another case where it's more appropriate. We're not concerned with that here. (A. 63-64)

Farmer then renewed his request to be permitted to introduce evidence in support of his motion, but the court responded, "I don't think that's necessary, Mr. Farmer" (A. 64-65).

At the close of the proceeding, the court reserved decision and issued a memorandum order the next day, denying the motion (A. 70-74). In its order, the court acknowledged that "[i]t is accepted practice of the judiciary in this State to permit, on proper motion, the appearance of foreign counsel pro hac vice;" that "the Courts of this Circuit and the State have been most liberal in granting pro hac vice motions;" and that "this Court has never denied such motion" (A. 71).

Despite these facts, the court held that it would deny Farmer permission to represent Bundy, announcing for the first time that, "for purposes of this case and in similar cases in the future,

this Court will utilize the standards promulgated by the American Bar Association in "Standards Relating to the Function of the Trial Judge, Sec. 3.5 (1972)" (A. 72).*/ Applying those ABA Standards, the court identified three bases for denying the motion:

(i) first, Farmer's Georgia contempt conviction. Referring to the "record of the trial court proceeding" in the Holton case and the opinion of the Georgia Court of Appeals, the court denounced Farmer's behavior there as "truly

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*/ §3.5 of the American Bar Association Standards Relating to the Function of the Trial Judge states in pertinent part:

> Attorneys from other jurisdictions. If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
>
> (a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action . . . .

shocking"*/ and declared, "This court simply . . . will not allow these proceedings to become a bizarre circus where Mr. Farmer can play ringmaster for an audience that could not possibly include a jury;"

(ii) second, Farmer's conduct during the pro hac vice motion, which the court characterized as "grounded on some perverse principle of maximized obfuscation;" and

(iii) third, Farmer's role in assisting Bundy to draft the motion to disqualify Judge Rudd which, the court stated, "conclusively shows that Mr. Farmer practices a frivolous kind of law that simply is not tolerated in this Circuit" (A. 73).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Bundy and Farmer requested both the Circuit Court and the County Court, orally and in writing,

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*/ As indicated, Farmer has petitioned this Court for review of the Georgia Court of Appeals decision in Farmer v. Holton, petition for cert. filed, 47 U.S.L.W. ____ (U.S. Dec. , 1978) (No. 78-).

to permit Farmer to serve as Bundy's defense counsel pro hac vice. At Bundy's first appearance in County Court on July 28, 1978, Assistant Public Defender Joseph Nursey, speaking on behalf of the motion, urged that "I don't think the office of Public Defender can represent Mr. Bundy in this cause. . . . Mr. Farmer is counsel of his choice, I feel that it would be a deprivation of his Sixth Amendment right to counsel" (A. 21). The County Court denied the motion without comment on the Sixth Amendment issue.

At the August 2, 1978 hearing in the Circuit Court, Farmer repeatedly requested the right to present evidence in support of his motion, and objected to unsworn and hearsay statements and evidence. Farmer also referred the court to several federal cases in support of his right to represent Bundy, including Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), "[in which the Sixth Circuit said] that there had to be a finding -- there had to be a hearing, and at the hearing they had to find that the out-of-state attorney was unfit. And in the In re Evans case [524 F.2d 1004 (5th Cir. 1975)], it -- it stated unfitness had be be such that the -- it was subject to

disbarment proceedings for his act; that he had to be placed on notice for what charges were being held against him; and allow an adequate opportunity for hearings" (A. 63).

In its decision, the Circuit Court recognized that the "ruling on these motions bottoms on the Sixth Amendment to our Federal Constitution" (A. 71). The Court concluded, however, that other federal pro hac vice cases were distinguishable. While acknowledging that a reasonably clear legal standard and a statement of the basis for any exclusion were required by due process (A. 72), the Court announced that it would henceforth follow a new standard and denied the motion based upon it (A. 72-75).

In his August 4, 1978 petition for a common law writ of certiorari to the Supreme Court of Florida, Bundy requested "an Order directing the state to show cause why Petitioner is being denied his Sixth Amendment right to counsel where there has been no prior notice given that Millard Farmer is unfit for admission pro hac vice, including specific allegations of unethical behavior to support such a finding, and there has

been no evidence presented of alleged misbehavior on his part" (A. 85).

In their August 14, 1978 joint petition to the Supreme Court of Florida, Bundy and Farmer alleged that Bundy's Sixth Amendment right to counsel, among others, had been violated (A. 179-80) and that Farmer's First Amendment rights had been abridged (A. 181).

The Supreme Court of Florida denied the petitions without comment.

REASONS FOR GRANTING THE WRIT

This case presents two related questions which have never been directly addressed by this Court and on which the lower courts have reached varying conclusions: first, whether the due process of law and a defendant's right to counsel require a state court to meet minimum procedural standards in resolving a motion for pro hac vice admission in a criminal case; and secondly, whether these same constitutional concerns combine with First Amendment rights of speech and association to impose any substantive standards upon state courts in the exercise of their discretion on such motions.

Pro hac vice admissions are, of course, a longstanding legal tradition, "apparently recognized as early as 1629 by English judges of Common Pleas," Cooper v. Hutchinson, 184 F.2d 119, 122 (3d Cir. 1950), citing Thursby v. Warren, 4 Car. 1, 79 Eng. Rep. 738 (C.P. 1629) and 6 Holdsworth, A History of English Law, 435-36, 453, 456-57 (1924). In this country, the practice of admitting out-of-state counsel in particular cases was well-recognized by the middle of the nineteenth century, see e.g., In re Mosness, 39 Wis. 509, 20 Am. Rep. 55 (Wis. 1976). As the Sixth Circuit has recently observed, "Nonresident lawyers have appeared in many of our most celebrated cases. For example, Andrew Hamilton, a leader of the Philadelphia bar, defended John Peter Zenger in New York in 1735 in colonial America's most famous freedom-of-speech case. Clarence Darrow appeared in many states to plead the cause of an unpopular client, including the famous Scopes trial in Tennessee where he opposed another well-known, out-of-state lawyer, William Jennings Bryan. Great lawyers from Alexander Hamilton and Daniel Webster to Charles Evan Hughes and John W. Davis were specially admitted for the trial of

important cases in other states." Flynt v. Leis, 574 F.2d 874, 878 (6th Cir.), petition for cert. filed 46 U.S.L.W. 3723 (U.S. May 23, 1978) (No. 77-1618).

Courts and commentators note that a number of practical factors justify the practice of pro hac vice admissions, including the frequent need to retain a legal specialist who may have no local equivalent, many clients' desire to be represented by attorneys with whom they may have had prior relationships, and on occasion, the unwillingness of local attorneys to represent zealously an unpopular client. See Note, Retaining Out-of-State Counsel: The Evoluation of a Federal Right, 67 Colum. L. Rev. 731 (1967); Note, Constitutional Right to Engage an Out-of-State Attorney, 19 Stan. L. Rev. 856, 860-62 (1967). Moreover, contemporary business and commercial practices, fostered by increasingly sophisticated methods of transportation and communication, have helped make interstate practice the rule in several areas of the law. See Brakel & Loh, Regulating the Multistate Practice of Law, 50 Wash. L. Rev. 699-702, See, e.g., Spanos v. Skouras Theatres Corp., 364 F.2d 161,

170-71 (2d Cir.), cert denied, 385 U.S. 987 (1966).

Despite this long history of pro hac vice admissions and the widespread increase in the number of attorneys with a significant interstate practice, no uniform rules governing interstate admission procedures and standards have developed, Brakel & Loh, Regulating the Multistate Practice of Law, 50 Wash. 699, 702-04 (1975). Instead, each state has promulgated its own rules without general guidance, as have the federal district and circuit courts, See Annot., "Attorney's Right to Appear Pro Hac Vice in Federal Courts, 33 A.L.R. Fed. 799, 802ff. (1977). The system has been generally characterized generally by Chief Justice Burger as "a hodgepodge of standards for admission, and regulations that are desperately in need of careful re-examination." Quoted in Wilkey, "Proposal for a 'United States Bar,'" 58 A.B.A.J. 355, 356 (1972).

As a result of these factors, serious conflict exists in the lower federal courts over whether state courts need conform to any minimum constitutional standards in resolving pro hac vice motions or in withdrawing permission to appear pro

hac vice once admission has been granted, compare Flynt v. Leis, 574 F.2d 874 (6th Cir.), petition for cert. filed, 46 U.S.L.W. 3723 (U.S. May 23, 1978) (No. 77-1618) and Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950) with Norfolk & Western Ry. v. Beatty, 400 F.Supp. 234 (S.D. Ill.), aff'd, 423 U.S. 1009 (1975) and Silverman v. Browning, 414 F.Supp. 80 (D. Conn. 1976). A similar conflict has arisen concerning the obligations imposed on federal district courts in resolving pro hac vice applications in federal courts by attorneys admitted in other federal districts, compare In re Evans, 524 F.2d 1004 (5th Cir. 1975) and United States v. Bergamo, 154 F.2d 31 (3d Cir. 1946) with Thomas v. Cassidy, 249 F.2d 91 (4th Cir.), cert. denied, 355 U.S. 958 (1957).

Petitioners respectfully submit that the importance of the question of standards governing pro hac vice admissions to the fair administration of the criminal justice system, and the conflicts on the issue which have developed in the federal courts, warrant a grant of certiorari by this Court.

Petitioners further submit that the present case presents an especially compelling occasion for this Court to address these issues. Petitioner Bundy, charged with two brutal and sensationalized murders, sought the voluntary services of Millard Farmer and Team Defense Project Inc., both because of Farmer's expertise and because of a prior attorney-client relationship. Farmer was denied persmission to represent Bundy, without an evidentiary hearing on the basis of newly-announced legal standards which are capable of being applied arbitrarily and which may have been so applied in tne present case.

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A STATE COURT TO HOLD AN EVIDENTIARY HEARING, WITH PRIOR NOTICE OF APPLICABLE LEGAL STANDARDS AND OF SPECIFIC INSTANCES OF MISCONDUCT, BEFORE IT MAY DENY AN OUT-OF-STATE ATTORNEY PERMISSION TO REPRESENT A DEFENDANT PRO HAC VICE IN A CAPITAL CASE

Two interrelated interests were offended by the Florida court denial of Farmer's pro hac

vice motion without according prior notice of relevant issues and an adequate evidentiary hearing: Petitioner Bundy's constitutional right to counsel of his choosing, and Farmer's interest in both his reputation and his employment in representing Bundy. In Powell v. Alabama, 287 U.S. 45 (1932) this Court recognized a defendant's right to appointed counsel in a capital case and also indicated that a defendant who could afford it had a general constitutional right to counsel of his choice:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense." 287 U.S. at 69.

In subsequent cases, this Court has expanded the protection of the right to counsel, calling it "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . ." Johnson v. Zerbst, 304 U.S. 458, 462 (1938); see Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972) and has also reaffirmed the suggestion in Powell that a defendant's "right

to be heard through his own counsel [is] unqualified," Chandler v. Fretag, 348 U.S. 3, 9 (1955); Crooker v. California, 357 U.S. 433, 439 (1958).

The lower courts have echoed the general proposition that to deny a criminal defendant the "counsel of his choice . . . violates the due process clause of the Fourteenth Amendment." Reickauer v. Cunningham, 299 F.2d 170, 172 (4th Cir.), cert. denied, 371 U.S. 866 (1962); see, e.g., United States v. Jones, 369 F.2d 217, 219 (7th Cir. 1966); Releford v. United States, 288 F.2d 298, 301 (9th Cir. 1961); Lee v. United States, 235 F.2d 219, 221 (D.C. Cir. 1956). Bundy has been denied that right without even an adequate hearing.

The court below minimized the importance of attorney Farmer's interest in representing Bundy, suggesting that it did not attain the status of a constitutionally protected right. Yet Farmer's interest, and his injury, are clearly substantial. As a specialist in capital punishment litigation engaged in a voluntary, multistate practice, Farmer has been branded an unacceptable practitioner in Leon County, Florida. Other prosecutors

throughout Florida and in other states who may not welcome Farmer's vigorous contest of a capital case have learned that Farmer may be excluded merely by the invocation of his prior Georgia contempt citations.

Petitioners submit that the inevitable, adverse impact on Farmer's multistate legal practice entitle him to due process protection under the "stigma plus" test developed by this Court in Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) and Paul v. Davis, 424 U.S. 693 (1976).

But in any event, this Court has expressed unwillingness to calculate an attorney's right to practice on a narrow rights-privileges standard in examining the related question of state bar admission standards:

> "We need not enter into a discussion whether the practice of law is a 'right' or a 'privilege'. Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing law except for valid reasons. Certainly, the practice of law is not a matter of the State's grace."

Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957); see also Konigsberg v. State Bar of California, 353 U.S. 252 (1957). The admission of attorneys pro hac vice in criminal cases requires a similar concern for procedural fairness.

Petitioners do not, of course, suggest that the interests they identify for this Court necessarily require the admission pro hac vice of attorneys in every criminal case - or even of Farmer in this case. It is undeniable that "[t]he States enjoy broad power to regulate 'the practice of professions within their boundaries' and '[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been "officers of the court."'" In re Primus, 436 U.S. 412, 422 (1978), quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

The issue however, is not whether states enjoy power to regulate pro hac vice admissions but whether the interests of attorneys and their clients require state courts to hold evidentiary hearings with prior notice of legal standards before ruling on pro hac vice motions. See, Flynt v. Leis, 574 F.2d 874, 877 (6th Cir. 1978); In re Evans, 524 F.2d 1004, 1008 (5th Cir. 1975).

Such measure of procedural fairness is particularly appropriate in a capital case; this

Court has repeatedly noted the qualitative difference of death as punishment, Lockett v. Ohio, ____ U.S. ____ 57 L.Ed.2d 973, 988 (1978); Gardner v. Florida, 430 U.S. 349, 357 (1977); Woodson v. North Carolina, 438 U.S. 280, 304-05 (1976), and has insisted on high standards of procedural fairness in capital cases, see, e.g., Reid v. Covert, 354 U.S. 1, 45-46 (1957)(concurring opinion of Frankfurter J.); id. at 77 (concurring opinion of Harlan, J.); Williams v. Georgia, 349 U.S. 375, 391 (1955); Stein v. New York, 356 U.S. 156, 196 (1953).

Further, this Court has long recognized the special need of a capital defendant for the "guiding hand of counsel at every step in the proceedings against him" Powell v. Alabama, supra, 287 U.S. at 69. Consequently, petitioners submit, a state court must be "particularly sensitive to see that every safeguard is observed," Gregg v. Georgia, 428 U.S. 153, 187 (1976), -- including the "safeguard" of a due process hearing -- before depriving a capital defendant of the attorney whom he has chosen and in whom he has placed his trust.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FIRST AND SIXTH AMENDMENTS AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IMPOSET ANY LIMITATIONS ON A STATE COURT'S DISCRETION IN DECIDING WHETHER TO PERMIT AN OUT-OF-STATE ATTORNEY TO REPRESENT A DEFENDANT PRO HAC VICE IN A CAPITAL CASE.

Florida's Rule 2.060(b) governing pro hac vice admissions grants a trial judge very broad discretion in handling such motions and provides, in effect, no uniform discernible standard. Indeed, the American Bar Association provision seized upon by the Florida court to deny Farmer's admission pro hac vice in this case would permit a state to impose an indefinite ban against any out-of-state attorney cited for criminal contempt without any inquiry into the circumstances of the contempt and without regard for any other factors bearing upon an attorney's fitness to practice. Petitioners respectfully submit that -- apart from considerations of procedural fairness -- the ABA standard adopted by the Florida court, and the Florida statute which permits its use, are unconstitutionally infirm, providing a broad weapon to keep controversial attorneys from appearing on behalf of unpopular criminal defendants.

Petitioners respectfully submit that Judge Rudd's decision in this case stemmed in large part from the court's improper consideration of Farmer's public utterances and Farmer's public stance against capital punishment. Indeed, during two separate hearings before the court, Judge Rudd expressly indicated that he had learned from extra-judicial sources of Farmer's public lectures on capital punishment and the defense of capital cases, and that he disapproved of Farmer's behavior (see the portions of transcript quoted, supra, at 6, 10-12). The overbreadth of the Florida Rule provided no check on the court's consideration of these factors.

Petitioners maintain that employment of the Florida Rule in this fashion infringed, not only Bundy's Sixth Amendment right to counsel, but Farmer's separate First Amendment rights of speech and association. During the civil rights movement in the 1960's, federal courts adjudicated a number of cases in which Southern courts sought to deny

attorneys from representing locally unpopular defendants by employing inflexible rules to govern pro hac vice admissions. In Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968), for example, the Fifth Circuit was forced to strike down rules promulgated by the United States District Court for the Southern District of Mississippi. Recognizing "that the District Court has a valid interest in regulating the qualifications and conduct of counsel," 401 F.2d at 245, the court nevertheless insisted that "[i]n these non-fee generating civil rights cases it is clear that only reasonable limits can be placed on a federal litigant's choice of counsel. . . ." 401 F.2d at 247. See Lefton v. City of Hattiesburg, 333 F.2d 280, 285-86 (5th Cir. 1964); see generally Sobol v. Perez, 289 F.Supp. 392 (E.D. La. 1968); Note, Retaining Out-of-State Counsel: The Evolution of a Federal Right, 67 Colum. L. Rev. 731, 734-37 (1967).

This Court has itself declared to be unconstitutional certain restrictions on the practice of law that have either compromised the rights of

association or have restrained efforts at political expression through litigation, insisting that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." NAACP v. Button, 371 U.S. 415, 439 (1963). In Button, this Court observed that "[b]road prophylactic rules in the area of free expression are suspect," and held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 371 U.S at 438.

This Court expanded the Button holding in Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964), upholding a union's practice of channeling FELA suits to selected union attorneys and establishing that Virginia "could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest," 377 U.S at 7. See also United Mine Workers v. Illinois Bar Ass'n, 389 U.S.

217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

Only last Term, in In re Primus, 436 U.S. 412, 56 L.Ed.2d 417 (1978), this Court found that South Carolina's professional discipline of an ACLU lawyer who had solicited a litigant in a sterilization case came within the expanding protection of Button. Finding that the ACLU "has engaged in the defense of unpopular causes and unpopular defendants", 436 U.S. at 427-28, and that the attorney's "actions were undertaken to express personal political beliefs and to advance the civil liberties objectives of the ACLU, rather than to derive financial gain," 436 U.S. at 222, this Court held that South Carolina was obligated to demonstrate a compelling state interest for its bar disciplinary regulations which compromised the attorneys First Amendment interests and cautioned that a state could "'regulate in [this] area only with narrow specificity,'" 436 U.S. at 422.

In the present case, petitioners respectfully submit that the Florida state court employed a similar "broad prophylactic rule" to exclude Farmer from representing Bundy for reasons that

have little to do with legitimate concerns over Farmer's fitness to practice law and a great deal to do with disagreements over Farmer's social and political views. The First and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment forbid consideration of such factors in determining a motion for admission pro hac vice.

CONCLUSION

Petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL
CIRCUIT, IN AND FOR
LEON COUNTY, FLORIDA.

CASE No. 78-670

STATE OF FLORIDA,

Plaintiff,

-vs-

THEODORE ROBERT BUNDY,

Defendant.

ORDER

This Cause came on to be heard upon motions filed by Theodore Robert Bundy and Millard Farmer, for an Order permitting Millard Farmer to appear pro hac vice on behalf of Theodore Robert Bundy, in Case No. 78-670. The Court has carefully considered all of the issues raised by the motions with regard to the facts and the controlling law. Given the importance of this ruling both to the movants as well as the State, the Court has sought to expedite ruling while setting forth in detail the reasons for the Order.

On July 27, 1978, Theodore Robert Bundy was indicted by the Leon County Grand Jury for inter alia, the multiple homicides that have come to be known as the Chi Omega murders. At the time of the indictment Defendant was incarcerated in the Leon County Jail for criminal conduct unrelated to the homicides. When the Defendant was arraigned on July 31, 1978, for the crimes charged in the July 27, 1978 indictment, he declined the services of the Public Defender. Rather, Defendant demanded that Mr. Millard Farmer, an Atlanta attorney and not a member of the Florida Bar, be permitted to represent him. The issue then is whether the Court, in the sound exercise of discretion, should permit a member of the Georgia Bar to represent the defendant in Case No. 78-670.

In ruling on this motion the Court has been governed by two overriding considerations. First, that the Sixth Amendment guarantee is an important right of criminal defendants and not lightly considered. Secondly, in order for the defendant to be given fair trial, there is an absolute requirement that the court maintain a level of decorum commensurate with the seriousnessof the event.

It is accepted practice of the judiciary in this State to permit, on proper motion, the appearance of foreign counsel pro hac vice. Although there is some discrepancy regarding the requirement of a co-counsel member of the Florida Bar (Compare; Integration Rule of the Florida Bar, Art. II, Sec. 2; with Fla. R. App. P. 9.440 (a)) there can be little argument on the discretion given to trial judges ruling on pro hac vice motions by both rules. Despite the discretionary nature of the rules, the Courts of this Circuit and the State have been most liberal in granting pro hac vice motions. In fact, this Court has never denied such motion, has generally welcomed foreign counsel into court, and has always treated foreign counsel with a level of respect and courtesy consistent with Florida's Code of Judicial Conduct. Therefore, it is with no small sense of gravity that the Court orders these motions DENIED.

The ruling on these motions bottoms on the Sixth Amendment to our Federal Constitution. At the August 2, 1978 hearing on the Bundy/Farmer motions, Mr. Farmer relied on two cases which do not necessarily support his motion and in any

event are factually distinguishable. First, he relies on In Re Evans, 524 F.2d 1004 (CA 5th 1975). In that case the appellate court granted a writ of mandamus ordering instatement of a pro hac vice attorney who had been denied appearance by the trial court. The court held that a Federal District Judge has no discretion to deny a pro hac vice motion. "in absense of a complaint rising to a level justifying disbarment." However, Mr. Farmer failed to cite the case of US v. Dinitz, 538 F.2d 1214 (CA 5th 1976), which substantially weakens the Evans holding. There the Court found that a defendant's sixth Amendment rights had not been abridged where the Federal District Court refused to hear the defendant through his chosen attorney. The court maintained that the standard of review in cases such as Dinitz is whether the trial judge abused discretion. The court held that the Sixth Amendment does not displace judicial discretion in the governance of attorneys who appear in Court. The responsibility of the trial judges in regulating (within reasonable limits) the conduct of court practice does not necessarily do violence to any Sixth Amendment rights.

Second, Mr. Farmer relies on the case of Flynt v. Lies [sic] 574 F.2d 874 (CA 6th 1978) for the contention that he has a right to appear pro hac vice. However, Flynt merely holds that an out of state attorney was denied procedural due process when a State Court approved counsel of record forms and subsequently denied the attorney's pro hac vice motion. Mr. Farmer has never been an attorney of record in any proceeding before this Court and therefore under Flynt his 14th Amendment rights could not have suffered. The Court in Flynt did not rule on the denial of any of the defendant's rights. Although this court is not unmindful of Mr. Farmer's 14th Amendment rights, there are, after all, greater concerns at issue in the case, to-wit: guaranteeing Mr. Bundy a trial in a courtroom atmosphere of fairness, calm and reason.

Nonetheless, the Flynt case is instructive on another critical point. The case suggests that due process demands that a trial court's ruling on a motion of this nature apply a reasonably clear legal standard and a statement of the basis for any exclusion. For purposes of this

case and in similar cases in the future this Court will utilize the standards promulgated by the ABA in "Standards Relating to the Function of the Trial Judge", Sec. 3.5 (1972). That Section reads as follows:

> 3.5 Attorneys from other jurisdiction. If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
>
> (a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action;
>
> (b) grant such permission on condition that
>
> (i) the petitioning attorney associate with him as co-counsel a local attorney admitted to practice in the jurisdiction.

> (ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his duties, and
>
> (iii) the defendant consents to the foregoing conditions.

It should be noted that the concurring opinion by Judge Clark in Dinitz suggested a standard quite similr to the second part of Sub Section (a).

Applying these standards this Court has ample grounds upon which to deny the motion. First, Mr. Farmer's conviction for criminal contempt by a Georgia trial court has recently been upheld by a Georgia Appellate Court (see attachment). Although there is an outstanding petition for certiorari in the Georgia Supreme Court, the record of the trial court proceeding is truly shocking. The appellate court labeled Mr. Farmer's conduct as "insulting", "contemptuous" and "contum_cious". A thorough reading of that opinion must lead one to the conclusion that Mr. Farmer's conduct during the trial in question was, by studied design, intended to provoke the

trial judge into intemperate remarks or precipitous acts which might result in a mistrial. This court simply cannot and, in fairness to the Defendant, will not allow these proceedings to become a bizarre circus where Mr. Farmer can play ringmaster for an audience that could not possible include a jury.

Second, the attached transcripts of the experience that this court has had with Mr. Farmer will show to any fair minded person that Mr. Farmer's concept of a trial is grounded on some perverse principle of maximized obfuscation. These transcripts indicate that Mr. Farmer is incapable of a simple yes or no response, regardless of the simplicity of the question. This sort of conduct is dilatory and disruptive and in no manner advances the cause of a defendant, justice or respect for the law.

Finally, the attached Fla. R. Crim. P. 3.230 motion, prepared by Mr. Farmer and originally signed by him, conclusively shows that Mr. Farmer practices a frivilous [sic] kind of law that simply is not tolerated in this Circuit. Even a casual reading of the allegations contained in the motion indicates that at the least Mr. Farmer

treats facts cavalierly and at the worst purposefully misstates them. If this motion is the kind of motion that is routinely penned by Mr. Farmer (and this Court fervently believes that it is) we could no doubt expect a deluge of frivolous and dilatory motions that have no basis in fact and are totality beyond the bounds of reality.

Accordingly, based on the facts and law as above outlined, the court finds that the pro hac vice motions do not have sufficient support and are hereby denied.

DONE AND ORDERED, in Chambers, Tallahassee, Leon County, Florida, this 3rd day of August, 1978, nunc pro tunc August 2, 1978.

/s/ John A. Rudd
JOHN A. RUDD
Circuit Judge

Copies furnished to:

Millard Farmer
Michael Minerva, Public Defender
Larry Simpson, State Attorney
Theordore Robert Bundy

APPENDIX B

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS

SUPREME COURT

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
Acousti Engineering Co. v. Sea	53332	7/18/78	Cert. den.	1st DCA 352 So.2d 1250
Advance Mortgage Corp. v. Hatmaker	53001	6/ 6/78	Cert. dism.	4th DCA 351 So.2d 728
Allied Products Corp. v. Esgro	54239	6/20/78	Cert. dism.	Ind. Rel. Comm.
Arnold Ford Sales, Inc. v. Special Disability Trust Fund	53248	9/11/78	Cert. den.	Ind. Rel. Comm.
Bared v. Miami Professional Sports, Ltd.	53220	7/24/78	Cert. den.	3d DCA 353 So.2d 167
Barkett Oil Co. v. Hill	53400	5/31/78	Cert. den.	Ind. Rel. Comm.
Barney Ryals Fruit Co., Inc. v. Liberty Mutual Ins. Co.	54286	7/28/78	Cert. dism.	Ind. Rel. Comm.
Bates v. District Court of Appeal, Third District	54732	8/28/78	Hab. Corp. den.	
Beaver v. Lumbermen's Mutual Casualty Co.	53917	8/17/78	Cert. dism.	
Becks v. Jacobs	53968	8/28/78	Cert. den.	1st DCA 355 So.2d 1241
Biscayne Roofing Co. v. Clark	53639	6/13/78	Cert. dism.	Ind. Rel. Comm.
Blackburn v. State	54322	6/14/78	Hab. Corp. den.	
Boggs v. State	52526	7/27/78	Dism.	4th DCA 348 So.2d 973
Bowles v. State	53436	7/18/78	Cert. den.	2d DCA 354 So.2d 990
Brooks v. Howard	53101	6/ 5/78	Mand. den.	
Brown v. Coleman	54518	8/28/78	Hab. Corp. den.	
Buckley v. Buckley	52675	7/18/78	App. dism.	4th DCA 343 So.2d 890
Bundy v. Rudd	54839	8/21/78	Cert. den.	Cir. Ct. (Leon)
Bundy v. State	54793	8/21/78	Cert. den.	
Butram v. State	53758	8/28/78	Dism.	2d DCA 356 So.2d 387
Campbell v. Seigler	54740	8/28/78	Hab. Corp. den.	
Carnes Concrete Pipe Co. v. Gehrig	54178	8/24/78	Cert. dism.	Ind. Rel. Comm.

* Date of decision or date rehearing denied (if requested).
** Court or agency rendering decision appealed and citation (if reported).